



TRIBAL AC LEGISLATIVE WORK GROUP – IRWM REPORT CALIFORNIA WATER PLAN, UPDATE 2013

Opportunities and Limitations for Tribal Engagement and Access to the Integrated Regional Water Management Grant Program August 23, 2013

This paper was developed by the Update 2013 Tribal Advisory Committee to describe the State of California's Integrated Regional Water Management (IRWM) Grant Program, as administered by the Department of Water Resources, namely: grant program history, provisions, and implementation. The paper discusses what has been working for Tribes, issues and concerns about Tribal participation and access to grant funding, recommended next steps to facilitate Tribal participation in the current grant program and to improve the provisions of a future IRWM Grant Program. The paper also provides references for additional information.

Background of Integrated Regional Water Management Program (IRWM)

The Integrated Regional Water Management (IRWM) Grant Program is a competitive grant program first created under the Water Security, Clean Drinking Water, Coastal and Beach Protection Act of 2002 (**Proposition 50**) with continuing funding provided by the Safe Drinking Water, Water Quality and Supply, Flood Control, River and Coast Protection Bond Act of 2006 (**Proposition 84**). Complementary funding was also provided by the Disaster Preparedness and Flood Prevention Bond Act of 2006 (**Proposition 1E**) for Stormwater Flood Management Grant Program.

The program is administered by the Department of Water Resources (DWR) and awards funds to local public agencies and non-profit organizations, for projects and programs to improve water supply reliability and improve and protect water quality and the environment. Such projects and programs must be consistent with an adopted IRWM Plan.

To effectively administer the grant program, DWR has developed Program Guidelines to reflect the program's requirements, including those contained in Proposition 84, the IRWM Planning Act, and related implementing legislation, along with the requirements for the complementary Proposition 1E. These guidelines are used for the disbursement of the Proposition 84 IRWM funding and the related Proposition 1E Stormwater Flood Management funding. The latest Program Guidelines were published by DWR in November 2012. The guidelines include general program requirements, eligibility requirements, proposal selection information, and the IRWM Plan standards and associated guidance.

The IRWM Grant Program is the culmination of various state bills and propositions to encourage and support integrated water planning and management in California; and funding to plan and implement integrated regional water projects. The following list represents those various state bills and propositions ("IRWM Statutes").



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- **2002** - Senate Bill 1672 creates the Integrated Regional Water Management Planning Act of 2002 to encourage local agencies to work cooperatively to manage local and imported water supplies to improve the quality, quantity, and reliability. (CWC § 10540-10543)
- **November 2002** - California voters pass Proposition 50, the Water Security, Clean Drinking Water, Coastal and Beach Protection Act of 2002, which provides \$500,000,000 (CWC §79560-79565) to fund competitive grants for projects consistent with an adopted IRWM plan.
- **November 2006** - California voters pass Proposition 84, the Safe Drinking Water, Water Quality, and Supply, Flood Control, River and Coastal Protection Bond Act, which provides \$1,000,000,000 (PRC §75001-75130) for IRWM.
- **November 2006** - California voters pass Proposition 1E, the Disaster Preparedness and Flood Prevention Bond Act, which provides \$300,000,000 (PRC §5096.800-5096.967) for Stormwater Flood Management projects which, among other requirements, must be consistent with an IRWM Plan.
- **SB2x-1 (Perata)**, 2008 – This repealed and replaced the IRWM Planning Act of 2002. It provided specific content requirements for IRWM Plans. It also provided a legislative directive for the IRWM Grant Program Guidelines.

A. IRWM Grant Program and IRWM Regional Partnerships Program

The IRWM Planning Act was intended to motivate local agencies, specifically those that did not customarily coordinate water management efforts, to form Regional Water Management Groups (RWMGs) to encourage cooperative and collaborative local management of water. This vision motivated the creation of the IRWM Grant Program.

As discussed above, the **IRWM Grant Program** has been funded with two State General Obligation Bonds (Propositions 50 and 84) with complementary funding from a third bond issue (Proposition 1E). With these funds DWR is administering three main grant programs:

1. **Planning Grants** – These grants were provided through Propositions 50 and 84. The Planning Grants fostered development, enhancement, or improvement of IRWM Plans.
2. **Implementation Grants** – These grants were also provided through Propositions 50 and 84. They fund programs and projects that are consistent with an IRWM Plan, along with other eligibility requirements.
3. **Stormwater Flood Management Grants** – Funding for these grants was provided for in Proposition 1E. The Stormwater Flood Management Grant Program is being administered as part of the IRWM Grant Programs. Eligible projects must manage stormwater runoff to reduce flooding. Projects must also be consistent with an IRWM plan, be consistent with the applicable Regional Water Quality Control Board Basin Plans, not be part of the State Plan of Flood Control, and yield multiple benefits.



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The IRWM Planning Act also resulted in the **IRWM Regional Partnerships Program**. DWR provides facilitation services and technical support services to RWMGs through this program. These services assist RWMGs in informing and advancing the practice of IRWM in their regions.

B. Strategic Plan for the Future of IRWM in California

State bond funds have allowed DWR to support IRWM throughout the state. However Integrated Regional Water Management is an on-going initiative of the state and thus must continue without the expectation of state water bond funding. Once the funding spelled out in the statutes mentioned above is spent, additional funding sources must be agreed to by state voters in later water bonds. Therefore, DWR, together with IRWM stakeholders, is developing a *Strategic Plan for the Future of IRWM in California* to:

- Build on the successes of IRWM
- Further enable, empower, and support RWMGs
- Better align state and federal programs to support IRWM
- Prepare for possible changes in state funding for IRWM
- Inform and influence future water management policies and investments.

The *Strategic Plan for the Future of IRWM* is currently in development and scheduled for completion early in 2014.

C. Major Questions Regarding IRWM

Where does IRWM Grant (public) Funding come from? – The state funding for the IRWM Grant Program comes directly from voter approved propositions and water bonds- see IRWM Statutes above. Local entities have also invested, as a cost share, significant amounts of local or other non-state funding towards implementing IRWM plans, programs, and projects.

What is required to form a Regional Water Management Group (RWMG) in order to participate in the IRWM Grant Program?

- **Make-up of RWMG** - Each IRWM region has a “regional water management group” (RWMG) in which, at a minimum, three or more local agencies, **at least two of which have a statutory authority over water supply or water management**, as well as those persons who may be necessary for the development and implementation of an IRWM Plan that meets the requirements in CWC §10540 and §10541. The members of the RWMG may participate by means of a joint powers agreement,



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memorandum of understanding or other written agreement, and approved by governing bodies of those *local agencies*.

- **Local Agency Criteria** - At least two of the RWMG members must be *local agencies* with statutory authority over water supply or water management. While Tribes with Water Codes and management authority could theoretically qualify as having authority over a water supply or water management, they do not meet the definition of a *local agency* under state code. CWC §10535 defines "Local agency" as "any city, county, city and county, special district, joint powers authority, or *other political subdivision of the state*, a public utility as defined in Section 216 of the Public Utilities Code, or a mutual water company as defined in Section 2725 of the Public Utilities Code." Tribes (both federally-recognized and not federally-recognized) that have lands within the region are considered to be potential members as well as stakeholders of the RWMG.
- **Regional Criteria** - IRWM is a place-based initiative looking at water management on a regional basis. There is a physical proximity requirement to encourage integrated and coordinated approaches to water management. Throughout California only two major areas are not yet included within an existing IRWM region. (See IRWM Map)

How do Tribes Access IRWM grant funds?

Tribes are not considered a "local agency" (as defined by California Water Code), and therefore would not qualify to be an IRWM grantee. However, Tribes are identified in the IRWM Planning Act as relevant stakeholders to the process and may put forth projects for the IRWM Plan. Possible modes of participation include:

- **RWMG participation** – This would include being part of and regular participation in the IRWM group. Governance models vary for IRWM groups, but each IRWM Plan must include the following (from 2012 IRWM Guidelines):
 - “...A description of the RWMG and explain how the makeup of the RWMG meets CWC §10539 (see above re **Make-up of RWMG**):and is sufficient in breadth of membership and participation to develop and implement the IRWM Plan.
 - A description of the IRWM governance structure
 - A description of how the chosen form of governance addresses and ensures the following:
 - Public outreach and involvement processes
 - Effective decision making



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- Balanced access and opportunity for participation in the IRWM process
 - Effective communication – both internal and external to the IRWM region
 - Long term implementation of the IRWM Plan
 - Coordination with neighboring IRWM efforts and State and federal agencies
 - The collaborative process(es) used to establish plan objectives
 - How interim changes and formal changes to the IRWM Plan will be performed
 - Updating or amending the IRWM Plan.”
- **Interested Stakeholder** – Tribes may be kept informed of IRWM work in their region by receiving notices from a RWMG and participating in RWMG meetings.
 - **Entity necessary for plan development & implementation** – In this capacity the Tribe may or may not be a member of the RWMG, but as a necessary entity they would need to be informed of the status of IRWM projects by the RWMGs, as follows (from the 2012 IRWM Guidelines):

“PRC §75102 mandates a California Native American Tribe Notification requirement for projects funded with Proposition 84 funds. PRC §75102 states:

“Before the adoption of a negative declaration or environmental impact report required under Section 75070, the lead agency shall notify the proposed action to a California Native American tribe, which is on the contact list maintained by the Native American Heritage Commission, if that tribe has traditional lands located within the area of the proposed project.”

Native American Tribe Notification will be part of DWR’s CEQA review for projects requesting funding under Proposition 84. While IRWM planning efforts may have tribal involvement, formal notification required by PRC §75102 ensures that tribes have an opportunity to consult with lead agencies regarding impacts to cultural resources prior to the closing of the CEQA process.”
 - **Grantee**- The grantee (the entity that enters into a grant agreement with the state) must be either a Local Agency (see definition above), or a 501(c)3. The IRWM Grant Program allows other entities, **including tribes**, to be “local project sponsors” of projects contained in an IRWM grant. The grantee and all local project sponsors that receive state funding would be subject to state law, as well as the grant agreement’s terms and conditions, which include project monitoring and reporting components.
 - **Local Project Sponsors** - This is an indirect model for receiving grant funding which has been used in the North Coast IRWM. The grantee for the IRWM Grant must be a Local Agency or 501(c)3; however a local project sponsor could be affiliated with the Grantee. This could include an MOU with the RWMG, and perhaps a limited waiver of sovereign



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immunity, depending on the project or the tribe. As well, all project proponents must adopt their region's IRWM Plan in order to receive Proposition 84 funding for projects.

Specifics of Tribal Access to IRWM Grants

Tribal governments are not defined as a "local agency" and are thus not included as eligible grant recipients. Therefore, Tribal governments must utilize other options to participate in the IRWM process:

- I. Joint powers authorities;
- II. Some form of agreement such as a Memorandum of Understanding (see project sponsor or proponent above); or
- III. Partnering with a Non-Profit Organization.

1. Joint Powers Authorities - AB 307, signed by Governor Brown on September 6, 2011, changed the definition of "public agency" for purposes of joint powers authorities (JPAs). This amended Section 6500 of the Government Code to permit federally recognized Indian tribes to join JPAs:

6500 (Emphasis added):

As used in this article, "public agency" includes, but is not limited to, the federal government or any federal department or agency, this state, another state or any state department or agency, a county, county board of education, county superintendent of schools, city, public corporation, public district, regional transportation commission of this state or another state, a federally recognized Indian tribe, or any joint powers authority formed pursuant to this article by any of these agencies.

California's JPAs are federations of federal, state, and local public agencies that jointly perform duties that each entity could perform on its own. California's JPAs collaborate to address public needs, such as financing public facilities, forming insurance pools, and enhancing planning and regulation. JPAs can be structured as an agreement between existing agencies or as a creation of a new, separate entity called a joint powers authority. (For more information on the origins of AB307 see Appendix A)

2. Memorandum of Understanding - Tribal governments may also enter into voluntary agreements with local governments such as a Memorandum of Understanding (MOU). Such an MOU would define the scope of participation by the Tribal government and any funding if available. These MOUs may require some form of limited waiver of sovereign immunity.



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3. Becoming or Partnering with a Non-Profit Organization - Many Non-Profit Organizations (NPOs) act as grant conduits. The amount of oversight by the NPO and whether they charge some form of administration fee varies on a case-by-case basis.

D. IRWM Grant Program Provisions for Tribal Engagement and Access to Grants

I. Why should Tribes engage in IRWM Programs?

The State of California now regards IRWM, and Integrated Water Management (IWM), as a key initiative that is crucial to ensure water supply, water quality, and the sustainability of water systems in California. If Tribes are not involved in local IRWM they could be left out of local decisions involving water management, access, and a host of issues relevant to tribal sovereignty and protection of tribal interests. Though sometimes complicated, participation in IRWM programs is also the only way to ensure access to available IRWM funding.

II. What Elements of IRWM Planning and Implementation are Relevant to Tribes?

An IRWM Plan must address the **IRWM Plan Standards**, below, which are used to describe what must be in an IRWM Plan and may also be used as criteria in Implementation Grant applications.

IRWM Plan Standards (from November 2012 IRWM Guidelines, p. 18-23, and Appendix B)	
1) Governance	9) Data Management
2) Region Description	10) Finance
3) Objectives	11) Technical Analysis
4) Resource Management Strategies (RMS)	12) Relation to Local Water Planning
5) Integration	13) Relation to Local Land Use Planning
6) Project Review Process	14) Stakeholder Involvement
7) Impact and Benefit	15) Coordination
8) Plan Performance and Monitoring	16) Climate Change

Currently, there are 16 **IRWM Plan Standards**, some of which include language specifically about Tribes, as listed below (emphasis added):

Standard 1) Governance – “Regardless of form, governance should be effective in updating and implementing the IRWM Plan, while safe guarding and supporting collaboration among stakeholders...The IRWM Plan must include a description of the RWMG responsible for the development and implementation of the Plan. RWMGs can include, but are not limited to, local public agencies, non-profit organizations, privately owned water utilities regulated by the Public Utilities Commission, **tribal governments**, and other stakeholders that are necessary to develop



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and implement the IRWM Plan... The development and implementation of an IRWM Plan needs to include a public involvement process that outreaches to the public and provides an opportunity for the public to participate in Plan development and implementation. Public involvement processes should be direct to local agencies and stakeholders, as applicable to the region, including... **Native American tribes** that have lands within the region.”

Standard 2) Region Description – “The intent of the Region Description Standard is to document that the IRWM planning region is defined by the combination of the water systems being managed; common water issues; and that there is sufficient variety of interested parties included in the planning region... This description should include a comprehensive inclusion of the following:

- A description of internal boundaries within the region including the boundaries of municipalities, service areas of individual water, wastewater, flood control districts, and land use agencies. The description should also include those not involved in the Plan (i.e. groundwater basin boundaries, watershed boundaries, county, State, and international boundaries)...
- A description of the social and cultural makeup of the regional community. Identify important cultural or social values. Identify DACs in the management area. Describe economic conditions and important economic trends within the region. Describe efforts to effectively involve and collaborate with **Tribal government representatives** to better sustain **Tribal** and regional water and natural resources (if applicable).”

Standard 6) Project Review Process – “The intent of the Project Review Process Standard is to ensure the process used for submitting, reviewing, and selecting projects is documented and understandable for regional stakeholders and the public.”

One of the factors that a project review process should employ when considering projects for inclusion in the IRWM Plan is:

“Specific benefits to critical water issues for **Native American tribal communities** - The project review process must consider if the project helps to address critical water supply and water quality needs of **Native American tribal communities** within the IRWM region. Such projects may include work that leads to a formal project such as a needs assessment, initial engineering work (design or study) to define a project, or feasibility studies that may lead to a project. Projects that specifically address such needs should be promoted in the project selection process.”

Standard 7) Impact and Benefit – “The IRWM Plan must contain a discussion of potential impacts and benefits of Plan implementation. This discussion must include both impacts and benefits within the IRWM Region, between regions, and those directly affecting DAC [disadvantaged community], EJ [environmental justice] related concerns, and **Native American Tribal communities**.”



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Standard 14) Stakeholder Involvement - The IRWM Plan must contain “a public process that provides outreach and an opportunity to participate in IRWM Plan development and implementation to the appropriate local agencies and stakeholders, as applicable to the region,” including **Native American tribes**. The IRWM Plan must contain “a discussion on how the IRWMG will endeavor to involve DACs and **Native American Tribal** communities in the IRWM planning effort.”

Note: Public Resources Code section mandate a California Native American Tribe notifications requirement for projects funded with Proposition 84 funding. The IRWM Guidelines incorporate the notification process contained in Public Resources Code section 75102.

- DWR’s IRWM Grant Program Guidelines contain the following definition: “**California Native American Tribe** – all Indigenous Communities of California, which are on the contact list maintained by the Native American Heritage Commission, including those that are federally non-recognized and federally recognized, and those with allotment lands, regardless of whether they own those lands. Additionally, because some water bodies and Tribal boundaries cross State borders, this term may include Indigenous Communities in Oregon, Nevada, and Arizona that are impacted by water in California.”
- For both IRWM planning and implementation grant applications, **IRWM Program Preferences and Statewide Priorities** are reflected in the scoring criteria. At least two of the eight **Statewide Priorities** are immediately relevant to Tribes:
 - 1) “Improve Tribal Water and Natural Resources: Preference points can be earned for proposals that include the development of **Tribal** consultation, collaboration, and access to funding for water programs and projects to better sustain **Tribal** water and natural resources.”
 - 2) “Ensure Equitable Distribution of Benefits: Preference points can be earned for proposals that
 - a. Increase the participation of small and disadvantaged communities in the IRWM process.
 - b. Develop multi-benefit projects with consideration of affected disadvantaged communities and vulnerable populations
 - c. Contain projects that address safe drinking water and wastewater treatment needs of DACs
 - d. Address critical water supply or water quality needs of **California Native American Tribes** within the region
 - e. Help meet State policies intended to provide access to safe, clean, and affordable water”
- Implementation Grant applications contain IRWM projects that must be part of and consistent with an adopted IRWM Plan; therefore Tribes should either get involved with the



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local IRWM Plan creation or ensure that any proposed projects for Tribes are considered for inclusion in the Project List of the IRWM Plan.

- All IRWM Implementation projects are required to complete CEQA as well as satisfy DWR's Appendix D - Native American Tribe Notification (attached), which specifically addresses RWMGs.
- Participation in an IRWM planning effort is voluntary.
- Tribal Sovereignty has raised questions regarding how the tribe would meet the grant agreement requirements. For example:
 - a. Grantees, project proponents, and local project sponsors are required to follow state laws; this may or may not be inconsistent with Tribal governance or Tribal laws.
 - b. An audited financial statement from each project proponent is required in order to ensure that a project proponent is sufficiently fiscally solvent and able to complete their project(s) and meet their grant obligations. It is unclear, what an equivalent document would be for a Tribe.
- The IRWM Planning Act does not authorize a RWMG to define or otherwise determine water rights of any person (CWC § 10549)

III. What are effective models for engaging Tribes in IRWM programs?

This issue is so divergent and varied, it has become the subject of a research project by a graduate student at UC Davis, Danielle Dolan. Ms. Dolan is being supervised by Professor Beth Rose Middleton. Assistance is being provided by Sherrie Norris, Stephanie Lucero and Kimberly Johnston-Dodds. The research project will evaluate various questions regarding Tribal participation in, and access to, the IRWM Grant Program, including without limitation the following:

- What is being done to engage Tribes?
- What is the preferred method of engagement by Tribes?
- What is effective in engaging Tribes?
- What is counter-productive?

At the end of the research project, a report will be developed evaluating the opportunities and limitations of the current IRWM Grant Program regarding its effectiveness in engaging California Native American Tribes and provide general recommendations for effective engagement of Tribes in the current grant program and ways to improve Tribal engagement and access to grant funding in future IRWM grant programs.



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APPENDIX A

IRWM Grant Program Guidelines: The following in order of most recent to oldest, are the grant guidelines used for IRWM funds.

- November 2012 Proposition 84 and 1E IRWM Guidelines

<http://www.water.ca.gov/irwm/grants/guidelines.cfm>

- August 2010 Proposition 84 and 1E IRWM Guidelines:

http://www.water.ca.gov/irwm/grants/docs/Guidelines/GL_Final_07_20_10.pdf



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APPENDIX B

(From November 2012 IRWM Grant Program Guidelines – Propositions 84 and 1E, p. 74)

NATIVE AMERICAN TRIBE NOTIFICATION

PRC §75102 mandates a California Native American Tribe Notification requirement for projects funded with Proposition 84 funds. PRC §75102 states:

“Before the adoption of a negative declaration or environmental impact report required under Section 75070, the lead agency shall notify the proposed action to a California Native American tribe, which is on the contact list maintained by the Native American Heritage Commission, if that tribe has traditional lands located within the area of the proposed project.”

Native American Tribe Notification will be part of DWR’s CEQA review for projects requesting funding under Proposition 84. While IRWM planning efforts may have tribal involvement, formal notification required by PRC §75102 ensures that tribes have an opportunity to consult with lead agencies regarding impacts to cultural resources prior to the closing of the CEQA process. This requirement does not relieve the responsibilities of a lead agency of other cultural resource notification and preservation obligations. DWR recommends using the OPR’s procedures for tribal consultation for General Plans and Specific Plans as guidance to meeting the Native American Tribe Notification requirement. The notification process an RWMG uses may include the following steps:

- Determine if the proposed project is a project under CEQA.
- If the project will use a negative declaration or an EIR to comply with CEQA and the CEQA document was not adopted by March 1, 2009, tribal notification is required prior to adoption of the CEQA document.
- To determine which tribes may have traditional lands located within the project area, send a request to the Native American Heritage Commission (NAHC) using the NAHC request form which can be found at the following link: http://www.nahc.ca.gov/consult_request.html. Expect a reply within 30 days.
- Once tribal information from NAHC is received, notify tribes of the project nature and project location.
- Allow tribes 90 days to reply to the notification.
- Solicit input from tribes that respond to the notification.
- Consider tribal input to the project prior to adoption of a negative declaration or EIR.

The above notification process follows OPR’s procedures for tribal consultation for General Plans and Specific Plans. While an IRWM Plan is not a general or specific plan, the methods and considerations for consultation with tribes, may be helpful. Further information on tribal consultation can be found at the following link: http://www.opr.ca.gov/s_localandtribalintergovernmentalconsultation.php

Contact information for the NAHC is as follows:

Native American Heritage Commission
915 Capitol Mall, Room 364
Sacramento, CA 95814



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Phone: 916-653-4082

Fax: 916-657-5390

<http://www.nahc.ca.gov>

APPENDIX C BACKGROUND FOR AB 307

In an opinion dated August 28, 1996, the California State Attorney General (AG) found that an Indian tribe does not meet any of the public agency definitions listed under the Joint Exercise of Powers Act, but rather is a "domestic dependent nation" separate and distinct from the United States. As a result, special legislation is necessary in order for individual tribes to enter into JPAs with legal public agencies.

Governor Schwarzenegger vetoed AB 1884 (Maze, 2008), which would have allowed the Tule River Tribal Council to enter into a JPA with the City of Porterville to develop commercial property in the vicinity of the Porterville Airport. AB 1962 (Berg, 2006) was vetoed by the Governor Schwarzenegger with the veto message expressing concern about ambiguous language and a lack of specifics about the scope of the Yurok Tribe's participation in a JPA. The Governor Schwarzenegger also vetoed AB 2762 (Levine, 2006), which would have allowed 17 federally recognized Indian tribal governments to enter into a joint powers agreement to participate in the Southern California Association of Governments. In 2005, Governor Schwarzenegger vetoed AB 1747 (Wolk, 2005), which would have allowed the Rumsey Band of Wintun Indians to join a JPA in Yolo County. More recently, in 2010 Governor Schwarzenegger vetoed AB 2166 (Chesbro, 2010), which sought to allow the Smith River Rancheria Tribal Council to enter into a JPA to participate in the Border Coast Regional Airport Authority.

AB 307 was signed by Governor Brown on September 6, 2011 and changes the definition of "public agency" for purposes of JPAs to include federally recognized Indian tribes.